MOHD SAUFI TAIB & ORS

v.

CIMB ISLAMIC BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[SUIT NO: S-23-163-2008]
9 AUGUST 2013

CONTRACT: *Breach - Negligence - Failure to credit cheques - Whether unforeseeable technical problems in Cheque Truncation and Conversion System resulted in delay of crediting cheques - Whether there were sufficient funds in client's current account*

TORT: *Defamation - Libel - Publication of words on return cheque advice - Whether words "refer to drawer" amounted to libel - Whether defence of qualified privilege applicable*

The plaintiffs' claim arose out of the defendant's dishonouring of four EON Bank cheques amounting to RM11,416 ('EON Bank cheques'). The plaintiffs, advocates and solicitors of a legal firm, averred that they had sufficient funds in their client's current account ('the account') to allow them to issue the CIMB Islamic Bank cheque ('CIMB cheque') to one Zakaria Samsudin ('Zakaria'). Unsuccessfully, the CIMB cheque was returned to Zakaria in the form of a return cheque advice bearing the words "refer to drawer". Due to the publication of the words, the plaintiffs contended that they were libelled. The plaintiffs also contended that the defendant was negligent in its failure to credit the EON Bank cheques and was therefore, in breach of contract. However, the defendant submitted that there was no breach on its part, as the plaintiffs had knowledge of insufficient funds in the account. It was alleged that the funds were insufficient as unforeseeable technical problems presented in the Cheque Truncation and Conversion System ('CTCS') resulted in a delay in crediting the proceeds of the EON Bank cheques. The plaintiffs sought damages against the defendant for negligence, breach of contract and tort of libel arising from the return of the CIMB cheque. The issues that arose for determination were (i) whether there were insufficient funds in the account; (ii) whether the words "refer to drawer" on the return cheque advice amounted to libel; and (iii) whether publication of the words "refer to drawer" was made on an occasion of qualified privilege.

Held (allowing plaintiffs' claim):

(1) The delay in the clearance of the EON Bank cheques due to the CTCS problem was devoid of merit. There was no evidence to support the defendant's claim that the CTCS problem was faced nationwide. In fact, the letter from the defendant to the plaintiffs stating "our cheque clearing system experienced unforeseeable technical difficulties recently" showed that it was the defendant which was facing the CTCS problem, an internal management problem occurred by usage of the word "recently". (para 26)

(2) On a balance of probabilities, there were sufficient funds in the account. Hence, the wrongful dishonour of the CIMB cheque by the defendant bearing the words "refer to drawer" on the return cheque advice amounted to a libel and the defendant could not rely on the defence of qualified privilege as it had acted with malice in dishonouring the CIMB cheque. (paras 32 & 34)

(3) The claimant need not allege that actual damage has resulted from the words complained of as the law presumes some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation and thus, entitled to general damages as the court may properly award. (para 38)

[Awarding plaintiffs a sum of RM275,000 as general damages.]

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd [2008] 5 CLJ 737 CA ***(foll)***

Carson v. John Fairfax & Sons Ltd [1993] 113 ALJR 577 ***(refd)***

Dato' Dr Tan Chee Khuan v. Chin Choong Seng [2011] 8 CLJ 574 HC ***(refd)***

English and Scottish Co-operative Properties Mortgage and Investment Society, Limited v. Odhams Press Limited [1940] 1 KB 440 ***(refd)***

Gibbons v. Westminster Bank Limited [1939] 2 KB 882 ***(dist)***

Government of Malaysia & Ors v. Jumat bin Mahmud & Anor [1977] 1 LNS 29 FC ***(refd)***

Sinnatamby Seahomes Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2001] 2 CLJ 299 HC ***(foll)***

Sukatno v. Lee Seng Kee & Anor [2009] 4 CLJ 171 CA ***(refd)***

Tan Ah Sam v. Chartered Bank [1970] 1 LNS 153 FC ***(foll)***

The Wagon Mound [1961] AC 388 ***(refd)***

Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal [2009] 3 CLJ 751 CA ***(refd)***

Other source(s) referred to:
Gatley on Libel And Slander, pp 509, 983, 984

For the plaintiffs - Muhammad Faiz Fadzil; M/s Faiz Fadzil & Co
For the defendant - Nad Segaram (Sharlini Jeyaratnam with him); M/s Shearn Delamore & Co

Reported by Shah Saharudin

JUDGMENT

Lau Bee Lan J:

Background

[1] The plaintiffs' claim is for damages against the defendant for dishonouring the four EON Bank cheques amounting to RM11,416 ("the EON Bank cheques") which the plaintiffs, claim is due to negligence on the defendant's part, a breach of contract and for the tort of libel arising from the return of the CIMB Islamic Bank cheque No. 000094 ("the CIMB cheque") with the advice "refer to drawer".

[2] Essentially it is the plaintiffs' case that they had sufficient funds in their client's current account No: 1418-0000022-10-2 ("the said account") to allow them to issue the CIMB cheque to one Zakaria bin Samsudin for the sum of RM57,635.06.

[3] The defendant was negligent in failing to credit the EON Bank cheques amounting to RM11,416 which were deposited into their client's current account No: 1418-0000022-10-2 and to honour the CIMB Bank cheque for the sum of RM57,635.06. This failure of the defendant amounted to a breach of contract with the plaintiffs.

[4] The plaintiffs were libelled by the publication of the words "refer to drawer" published on the return cheque advice dated 11 July 2008.

[5] Essentially the defendant's defence is:

(a) There is no breach of contract on the defendant's part as the plaintiffs issued the CIMB Bank cheque despite knowing there were insufficient funds in the said account. There were insufficient funds as:

A (i) the unforeseeable technical problems that presented in the Cheque Truncation and Conversion System ("CTCS") introduced by Bank Negara on 13 June 2008 resulted in a delay in crediting the proceeds of the EON Bank cheques which was only credited on 11 July 2008;

B (ii) the plaintiffs made enquiry with CIMB Hotline on 8 July 2008 on the status of the EON Bank cheques and was informed that the proceeds of the EON Bank cheques had not cleared and the amount therein had not been credited into the said account. Despite this the plaintiffs proceeded C to issue the CIMB Bank cheque which was presented for payment on 10 July 2008 and there were insufficient funds in the said account which led to the CIMB Bank cheque being dishonoured; and

D (iii) the defendant had in good faith issued a letter dated 24 July 2008 and informed the plaintiffs of the CTCS problems and the effect of the same. The defendant as a gesture of goodwill made a refund of the charges imposed for the non-honoured cheque.

E (b) The words "refer to drawer" on the return cheque advice does not amount to libel and the said words did not defame the plaintiffs.

F (c) The publication of the said words was made on an occasion of qualified privilege.

Witnesses

[6] At the trial the following witnesses testified:

G (i) for the plaintiff:

(a) SP1 - Saadiah binti Ibrahim, Current Accounts officer, Hong Leong Branch UEP Branch;

H (b) SP2 - Mohd Saufi bin Taib, an advocate and solicitor/ partner of Messrs Saufi, Putra & Associates; and

(c) SP3 - Zakaria bin Samsudin, retiree;

I (d) SP4 - Surya Putra bin Mohamed Taulan, an advocate and solicitor of Messrs Saufi, Putra & Associates.

(ii) for the defendant:

(a) DW1 - Selva Kumary a/p Suppiah, administrative executive;

(b) DW2 - Mohd Suhaimi bin Tajuddin, Assistant Customs Service Manager with CIMB Bank Group; and

(c) DW3 - Shamsudin bin Che Sub, Senior Manager, ICIMB.

Undisputed Facts

[7] The following facts are undisputed being the agreed facts between the parties. The rest of the narrative will unfold as I deal with the various issues. The plaintiffs are at the material time advocates and solicitors and/partners of a legal firm practising under the name of Messrs Saufi, Putra & Associates, No. 283A, Jalan Bandar 11, Taman Melawati, 53100 Kuala Lumpur.

[8] The plaintiffs are the defendant's customer and they maintained the said account at the defendant's branch at Block 8, Kompleks Pejabat Kerajaan, Jalan Duta, 50480 Kuala Lumpur. The said account is a client's account established under the Legal Profession Act 1976 and its regulations.

[9] The EON Bank cheques totalling RM11,416 comprised EON Bank cheque No. 692611 of RM200, EON Bank cheque No. 692612 of RM10,000, EON Bank cheque No. 692617 of RM630 and EON Bank cheque No. 692618 of RM586 were deposited for collection at the defendant's branch at Seksyen 18, Shah Alam at about 8pm on 18 June 2008 (bundle C pp. 1-2).

[10] The second plaintiff had contacted the CIMB Hotline for clarification concerning the EON Bank cheques and the said account.

[11] The plaintiffs had on 9 July 2008 issued the CIMB cheque for the sum of RM57,635.06 to the payee, Zakaria bin Samsudin (bundle D p. 16 (exh. P3), the covering letter dated 9 July 2008 in respect of the CIMB cheque).

[12] The said payee, Zakaria bin Samsudin had banked in the CIMB cheque into his account at Maybank Berhad. However the CIMB cheque was returned to him in the form of image return document ("dokumen pulangan imej") and the return cheque advice ("notis pulangan cek") dated 11 July 2008 bearing the words "refer to drawer" (bundle C p. 5).

[13] The defendant had debited RM105 from the said account for the dishonour of the CIMB cheque (bundle B p. 8) but had thereafter refunded the sum of RM105 into the said account on 23 July 2008 (bundle B p. 10).

[14] The plaintiffs had sent a letter dated 23 July 2008 seeking clarification on the EON Bank cheques and the said account. The defendant replied *vide* letter dated 24 July 2008.

Findings

Whether There Was Insufficient Funds In The Said Account

[15] For the plaintiff to succeed in their cause of action on negligence, it is incumbent on the plaintiffs to prove:

(a) that a duty of care was owed to them by the defendant;

(b) that there was breach of that duty of care;

(c) that in consequence thereof they suffered harm; and

(d) the damages suffered is not too remote.

(See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 (CA) at p. 600 e-f; *Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal* [2009] 3 CLJ 751 at p. 761 F-I to p. 762 A-D; *Sukatno v. Lee Seng Kee & Anor* [2009] 4 CLJ 171 at p. 186; [2009] 3 MLJ 306 at p. 321 paras. 47-48 (CA); *The Wagon Mound* [1961] AC 388; *Government of Malaysia & Ors v. Jumat bin Mahmud & Anor* [1977] 1 LNS 29; [1977] 2 MLJ 103 (FC) at p. 104B).

[16] The following evidence has to be read in conjunction with the undisputed facts above. SP2 testified on 18 June 2008 he had banked in the EON bank cheques into the said account. SP2 stated the EON bank cheques were debited from his EON Bank personal account No. 0090-10-007532-9 as evident from his EON Statement of Account dated 1 July 2008 (exh. P1, original copy and exh. P1A, copy at bundle D pp. 14-15).

[17] According to SP2 the EON Bank cheques were issued (i) from his personal account as the replacement for the cash paid by the different clients; (ii) as a normal course of the legal practitioner's business and there was nothing improper; and (iii) the cash deposit machine did not transact RM1 and RM5 (in cross-examination - notes of proceeding ("NOP") p. 36).

[18] In this regard I am of the view the defendant's submission that the normal practice of mixing personal monies and client account monies flouts established principles of maintaining client accounts under the Legal Profession Act 1976 is to be disregarded as it is not pleaded. Further it is general banking practice that the cash deposit machine do not transact RM1 and RM5 notes.

[19] SP2 stated the EON Bank cheques had been paid by EON Bank since 19 June 2008 based on the EON Statement of Account. This is supported by SP1 who in examination in chief stated the EON Bank cheques were debited from SP2's EON's personal account No. 0090-10-007532-9 on 19 June 2008. SP1 confirmed the same in cross-examination and added that the EON Bank cheques were credited into the account of Saufi Putra & Associates.

[20] SP1 stated in examination in chief that according to banking procedure, the cheques will be credited into the "akaun penerima di dalam masa tiga waktu bekerja" and this is the standard practice for all banks in Malaysia (NOP pp. 5-6). SP1 also stated that SP2's EON Statement of Account and the image copy of the EON Bank cheques (exh. P2 A-D) showed that SP2 had sufficient funds at the material time. SP1 confirmed in cross-examination "berdasarkan pada penyata akaun Encik Mohd Saufi, saya sahkan cek ini tidak mempunyai apa-apa masalah semasa pengeluaran." (NOP p. 8).

[21] In re-examination, SP1 confirmed the EON Bank cheques were credited into the client's account of M/s Saufi, Putra & Associates based on the "cheque details" appearing at the top half of exh. P2(A-D) which he described as:

> UIC [is] Unit inward clearing reference
>
> Then followed by the account number, cheque number, paying branch yang bernombor 2312190 adalah untuk EON Bank Berhad, untuk presenting bank, bernombor 4414025 adalah untuk CIMB Bank.

[22] SP2 testified he had issued the CIMB cheque of RM57,635.06 to the payee, SP3, upon his request for the balance purchase price of the sale of his house *vide* a sale and purchase agreement dated 30 November 2007 (exh. p4, bundle D pp. 1-13) wherein M/s Saufi, Putra & Associates had acted for SP3, as vendor.

[23] SP2 testified in cross-examination that before he issued the CIMB cheque, (i) he had requested SP4 to verify with the defendant on the availability of funds in the said account and the latter had done so *vide* telephone calls; (ii) the plaintiffs had complained to the defendant on the delay of the clearance of the EON Bank cheques and had informed them on the urgency of the issuance of the CIMB cheque; (iii) the plaintiffs had the reasonable belief that the EON cheques would be cleared within three working days as per the statement written on the EON Statement of Account of "Baki tercatat mungkin merangkumi jumlah cek-cek tempatan yang dipungut untuk penjelasan. Sila beri tempoh 2-3 hari bekerja untuk penjelasan cek-cek berkenaan."; and (iv) no notice was given to them that the defendant was facing any problems with the CTCS.

[24] SP4 corroborated SP1's evidence in that he had made inquiries with the defendant concerning the availability of the funds in the said account prior to the issuance of the CIMB cheque which is evident from the call log which SP4 had with DW1 on the CIMB Hotline on 8 July 2008 at 4.18pm and 9 July 2008 at 6.27pm (exh. 6A - CD recording and exh. 6B - transcripts, bundle D pp. 24-26). The salient part of the evidence is:

(a) Prior to the phone conversation on 8 July 2008, there were previous calls made to the CIMB Hotline whereby, amongst others, the plaintiffs received an earlier instruction on what were the documents to be faxed to the call centre as is evident from bundle D p. 24:

(i) Selva : Selamat tengah hari ye. Encik Surya Putra, saya Selva dari call center. Saya baru terima ye. Saya dah terima fax ini so saya hantar sekarang ye.

(ii) SP4 : Call yang saya buat pada 8.7.2008 adalah saya call semula untuk sahkan dengan pihak officer CIMB berkenaan dengan repot saya yang saya telah fakskan kepada mereka (slip deposit cek berserta slip penerimaan dari mesin (deposit cek) CIMB (Bundle C pp.1-2) ... Saya inform kepada officer bank berkenaan dengan jumlah yang tidak cukup di dalam akaun klien (firma) saya.

(iii) SP4 : Sebelum ini ... Cik Selva maklumkan saya yang repot saya telah diambil. Dia telah memberikan satu log number (FR/64312/080708) ... kemudian disuruh menyatakan di situ Attention kepada Ms. Selva. Dia

bagi dia punya extension number 23115 kemudian dia beri number faks untuk fakskan 0326161133 (Bundle C p. 1).

(iv) SP4 : Sebelum saya diberi log number, ... saya buat repot berkenaan cek-cek EON yang tidak dikreditkan ke dalam akaun saya. Akaun clien firma saya. Saya dimaklumkan oleh officer CIMB di dalam talian hotline itu, yang cek-cek ini tidak ada dalam transaksi mereka. Jadi saya check balik kepada satu lagi akaun office saya.

(v) SP4 : Kerana kami sedar itu (cek tak clear) apabila kami menerima arahan anak guam untuk mengeluarkan cek. Seminggu sebelum sebab anak guam bagi arahan untuk kami keluar cek.

(b) Further in cross-examination, DW1 stated:

Q : Selamat tengah hari ye. Encik Surya Putra, saya Selva dari call centre. Saya baru terima ye. Saya dah terima fax ini. Based on this, there was an early call.

DW1 : Yes.

Q : Encik call tadi ya. Did you get that? Based on this, it means that there was an early phone call before this call.

DW1 : Yes.

Q : At the time there were other agents other than you. So any other call that Putra mentioned there is possibility that he talked to other agents?

DW1 : Yes.

Therefore I find the defendant's submission that the plaintiffs' references to earlier enquiries made with the defendant were not pleaded and should be disregarded is misconceived as not only did the plaintiffs pleaded:

6. Plaintif-plaintif kemudiannya menghubungi pihak CIMB Hotline beberapa kali bagi mendapatkan penjelasan tentang cek-cek dan akaun tersebut.

but it is substantiated by the evidence in para. 17(a) and (b) above.

(c) On 9 July 2008, DW1 informed SP4:

(i) Cik Selva telah menyemak dan katakan mereka dah dapat imej. Dan sekarang mereka hanya tunggu proses untuk clearing sahaja.

(ii) SP4 Apabila En Zakaria masukkan cek dia akan tunggu 3 hari untuk cek to clear. So saya maklumkan yang wang itu perlu ada dalam akaun klien firma kena ada pada esoknya. Maklumkan Selva.

(iii) (Setahunya cek boleh diclearkan dalam) 3 hari.

(iv) Sepanjang conversation (dengan DW1) (beliau) tidak dimaklumkan yang kena tunggu 3 hari. Maksud saya cek akan clear hari esok. Sebab itu (Plaintiffs) keluarkan (CIMB cheque).

(v) The plaintiffs did not wait for three days after being informed because:

SP4 Ini kerana cek-cek yang dimasukkan 19.6.08 telah clear daripada EON Bank pada 19.6.08 lagi. Jadi apabila saya report kepada CIMB maklumkan mereka telah dapat imej dan mereka telah semak jadi cek tu sepatutnya clear pada esok hari Yang Arif. Dan juga. Oleh kerana saya dimaklumkan oleh En Saufi yang client Zakaria memang memerlukan cek dengan segera.

(vi) The plaintiffs did not waiver when cross-examined as to why the plaintiffs proceeded to issue the CIMB cheque despite knowing that the EON Bank cheques have not been credited into the said account stating:

PW4 Kerana saya tahu melalui penyata akaun En Saufi, yang cek-cek tersebut telah didebitkan dari akaunnya. Saya membuat semakan dan juga melaporkan kepada pihak CIMB dan waktu saya membuat laporan itu adalah 20 hari selepas cek itu didebitkan (dari akaun En Saufi).

PW4 Dan apabila saya periksa dengan, apabila saya diberitahu oleh Cik Selva yang cek-cek saya itu telah ada dalam sistem mereka. Pastinya hanya akan mengambil masa yang singkat. Kerana. Untuk mengkreditkan ke dalam akaun.

PW4 Kerana CIMB adalah salah satu bank terbesar di Malaysia.

(vii) The plaintiffs maintained the same position in re-examination when clarifying why they issued the CIMB cheque knowing that they cannot issue a cheque if there was insufficient fund in the said account, stating:

> PW4 Kerana daripada statement En Saufi cek-cek itu telah lama didebitkan. Kemudian kami sebelum mengeluarkan cek CIMB Islamic itu membuat semakan dan memberitahu kepada pihak bank yang kami perlu mengeluarkan cek CIMB Islamic itu dan pihak officer CIMB Islamic.
>
> PW4 Kalau ikut sini, Officer hotline. Selva tidak pernah menghalang kami untuk keluarkan cek CIMB itu.

(viii) As to the defendant's contention that the CIMB cheque was issued to SP3 during office hours before the telephone conversation with DW1 on 9 July 1008 at 6.27pm, SP4 stated he did not agree as it was issued after the telephone conversation. SP4 further clarified in re-examination that:

> PW4 Kerana saya dan En Saufi jalankan profesion guaman ini, En Saufi menguruskan bahagian conveyancing saya uruskan bahagian jenayah, kesemua urusan di pejabat itu dilakukan oleh kami berdua dan masa kerja kami adalah lebih dari pukul 6 petang. Kadang kala kami terpaksa buat meeting dan appointment dengan client pada sebelah malam kerana pada masa petang saya terlibat dalam urusan mahkamah.

[25] In cross-examination when shown bundle E pp. 1-5 (exh. D7), SP2 said that they were not the terms and conditions of the CIMB Islamic Bank. In re-examination, SP2 stated (i) bundle E pp. 6-11 was the application form for the opening of the said account which he and SP4 signed as co-signatories in operating the said account; and (ii) they not given any terms and conditions.

[26] The contention of the defendant that the delay in the clearance of the EON Bank cheques was due to the CTCS problem is devoid of merit. There is no evidence as such from the defendant and neither is there evidence to support the defendant's claim that the CTCS problem was faced nationwide. In fact the letter dated 24 July 2008 from the defendant to the plaintiffs

(bundle B p. 9) stating that "**our** cheque clearing system experienced unforeseeable technical difficulties **recently**." (emphasis added) showed that it was the defendant which was facing the CTCS problem. In my view the CTCS problem is an internal management problem which occurred around and about 24 July 2008 by the usage of the word "recently" in the said letter. In fact when cross-examined, DW3 stated:

> Q : So what you understand here. Once the customer debited the cheque with CIMB, CIMB is collecting Bank. CIMB has to make sure. CIMB will send image to paying bank, EON Bank. So, when the paying bank received the image, there's no error to the cheque, or the fund is sufficient, the paying bank is obliged to make the payment of the said cheque by debiting the amount from the account.
>
> DW3 : Agree.

[27] The court finds the defendant owes a duty to the plaintiffs to ensure that the EON Bank cheques were credited into the said account within three working days. This can be gathered from the following evidence:

(a) PW1

> S : Mengikut amalan dan peraturan perbankan, berapa harikah cek-cek ini akan dikreditkan di akaun penerima?
>
> PW1 : Ikut prosedur bank, cek akan dikreditkan kepada akaun penerima didalam masa 3 hari waktu bekerja.

(b) DW2

> S : You agree with me in normal course of business and practice you clear the cheque in three days?
>
> DW2 : Yes.
>
> S : I refer you to Bundle B, green, page 7. At the top. Right side, "Baki tercatat …" This mean the cheque will be cleared within 2-3 days.
>
> DW2 : Yes.

(c) DW3

> S : Basically the collecting Bank has demanded the payment from the paying bank. The normal course of banking practice and the regulations, the said cheque, has to be cleared or credited into the customer's account within 3 days?

DW3 : Yes, provided that the customer bank in within the stipulated clearing time. Before 4 o'clock on the same day, on day one. It will be cleared by the 3rd day. If bank in after 4 pm, it will cleared on the 4th day.

S : So it is duty of collecting bank to credit the cheque into customers account within 3 working days?

DW3 : In normal circumstances, 3 working days.

[28] I rely on the case of *Tan Ah Sam v. Chartered Bank* [1970] 1 LNS 153; [1971] 1 MLJ 28 at p. 30A-B right column, where the Federal Court opined:

> The relationship between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques when the account is in credit. (*Paget's Law of Banking* 7th edition, p. 269).

[29] Support is also found in the case of *Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd* [2008] 5 CLJ 737 wherein the Court of Appeal held at p. 748 F-G "The wrongful dishonour of a cheque amounts to a breach of contract by a bank against his customer since it will as a natural consequence affect the drawer's credit".

[30] Based on the evidence I find as the EON Bank cheques have been paid by EON (paying bank) since 19 June 2008, the plaintiffs have a *bona fide* and reasonable belief that the defendant will take prompt action to credit it. Thus I find there is no break in the chain of causation by the plaintiffs as the insufficient fund was a direct effect of the defendant's negligence in crediting the EON Bank cheques in time.

[31] The defendant contended that the plaintiffs have contributed to the dishonouring of the CIMB cheque because they have knowledge of the insufficient funds in the said account. In my judgment this contention is devoid of merit for the reasons which are submitted by the plaintiffs:

(i) The Plaintiffs have legitimate expectation that the EON Bank cheques had been credited promptly to the said account as EON Bank had paid for almost 22 days. On top of that, there is a clear representation by the Defendant that cheque will be cleared within 2-3 working days.

(ii) The PW4 have been informed *via* the call log at page 27 of Bundle D that the EON Bank cheques was only waiting for clearing process and DW1 did not inform how long it will take. At page 29 of Bundle D, PW4 informed DW1 strictly that the Plaintiffs have to issue a cheque and yet it was not prohibited by the DW1 to do so.

(iii) The Plaintiffs have the belief that DW1 as the customer service Hotline officer had informed the appropriate Department about the inquiry. As the EON Bank cheques have been paid since 19.6.2008, the Defendant was expected to take urgent and immediate action as it has been a delay for 22 days. This is because the Plaintiffs have reasons to believe that the Defendant's management was efficiently managed and moreover there was no notice of irregularities nor problems in Defendant's management. Therefore, whether or not the Plaintiffs need to refer to the branch was irrelevant as DW1 should have taken appropriate action as it was the Defendant's obligation to pay the cheque.

(iv) The conduct of the Defendant in refunding the charge of RM100.00 to the Plaintiffs had contradicted the Defendant's contentions that the Plaintiffs had contributed to the dishonouring of CIMB cheque. It is trite law that the party cannot approbate and reprobate. This is evident from the evidence of DW2:

Q : If you credited means you pay back RM100. First you debited later on you credit back.

DW2 : Refund.

Q : You refund the RM100 back.

DW2 : Bank's error.

Q : It's not the customer's fault, it's the bank's fault. Do you agree?

DW2 : Yes.

[32] On a balance of probabilities since I find there are sufficient funds in the said account, the wrongful dishonour of the CIMB cheque by the defendant bearing the words "refer to drawer" on the return cheque advice amounts to libel. I find support for this in the case of *Top-A Plastic Sdn Bhd* (*supra*) at p. 739 Held 2; p. 750 at para. 21 that:

> The words "Frozen Account" and "Refer To Drawer" were highly libellous and tantamount to mean that the plaintiff had been locked up or had gone into liquidation. While those words may

not necessarily impute actual insolvency the words impute stoppage of payments which would tend to injure his credit in a financial sense since the plaintiff was found to be engaged in business transactions.

[33] The defendant submitted that the "refer to drawer" remark was done in a situation where it was acceptable to do so on grounds of qualified privilege in that as there were insufficient funds in the said account, the defendant was under a duty as a prudent banker to decline the same.

[34] In my judgment, the defendant cannot rely on the defence of qualified privilege because I find the defendant had acted with malice in dishonouring the CIMB cheque for these reasons:

(a) the EON Bank cheques were paid by EON Bank since 19 June 2008;

(b) there was evidence that cheques are cleared within three or four working days;

(c) the defendant were informed by the plaintiffs concerning the urgent need for the clearance of the CIMB cheque;

(d) the defendant owed a duty of care to the plaintiffs to ensure that the EON Bank cheques were credited into the said account which were only credited on 11 July 2008, a day after the defendant dishonoured the CIMB cheque.

Damages

[35] Since I had on a balance of probabilities found the defendants are liable to the plaintiffs for negligence, breach of contract and for libel, I now turn to the amount of damages to be awarded to the plaintiffs.

[36] In terms of damages, the plaintiffs submit they ought to be awarded:

(a) general damages of RM251,152 (RM11,416 x 22 days delay);

(b) aggravated damages of RM500,000 for (i) defendant's failure to credit the EON Bank cheques even though they had received the payment from EON; and (ii) it is a breach of the plaintiffs' constitutional right over its property;

(c) general damages of RM500,000 in respect of the dishonouring of the CIMB cheque as the plaintiffs are solicitors as they had suffered injury to their reputation and business citing *Sinnatamby Seahomes Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2001] 2 CLJ 299 at p. 319 h; and

(d) aggravated damages of RM500,000 in respect of the dishonouring of the CIMB cheque for failing to take immediate action to clear the EON Bank cheques despite the plaintiff's report and the non notification of the CTCS problem.

[37] With respect to damages, the defendant contended:

(a) the plaintiffs suffered no actual loss arising out of the timing of the crediting of the EON Bank cheques and any damages, if awarded should be nominal;

(b) only interests should be awarded for any injury to the plaintiffs citing *Gibbons v. Westminster Bank Limited* [1939] 2 KB 882 as the plaintiffs did not plead special damages; and

(c) with respect to the claim for libel, the plaintiffs did not suffer any damage to its reputation as the firm still continued to operate and no documentary evidence to establish the damage suffered.

[38] Contrary to the defendant's contention referred to earlier, in determining the award of damages in an action for defamation, the claimant need not allege that actual damage has resulted from the words complained of as "the law presumes some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation" and he is entitled to general damages as the court may properly award (*Gatley on Libel And Slander*, para. 28.27 pp. 983-984; *English and Scottish Co-operative Properties Mortgage and Investment Society, Limited v. Odhams Press, Limited* [1940] 1 KB 440 (English Court of Appeal) at p. 461).

[39] In assessing damages, the court is entitled to take into consideration the conduct of the plaintiff, his position, and standing, the nature of the libel, the mode and extent of publication, the absence of apology, the evidence led in aggravation or mitigation of the damages: see *Gatley on Libel and Slander* at p. 509 para. 1380 as cited in *Dato' Dr Tan Chee Khuan v. Chin Choong Seng* [2011] 8 CLJ 574; [2011] 8 MLJ 608 at p. 626 I.

[40] In *Carson v. John Fairfax & Sons Ltd* [1993] 113 ALJR 577 which was cited in *Dato' Dr Tan Chee Khuan* (*supra*) at p. 593 G-H (CLJ); p. 627 B-C (MLJ), the High Court of Australia enunciated damages are awarded for defamation for three purposes:

> … The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant.

[41] In respect of the claim for negligence and breach of contract, I find the plaintiff has suffered damages for loss of the use of the funds of RM11,416 for 22 days. There was evidence that the EON Bank cheques were debited from SP2's account on 19 June 2008. After inquiries made the plaintiffs issued the CIMB cheque on 9 July 2008. I adopt the principle alluded to by the plaintiff in *Sinnatamby Seahomes Sdn Bhd* (*supra*) where the learned judge (as he then was) at p. 319h stated:

> The general object underlying the rules for the assessment of damages is, so far as possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract? (*Dodd Properties (Kent) Ltd & Anor v. Canterbury City Council & Ors* [1980] 1 All ER 928, 938).

[42] In respect of the libel SP2 has testified that SP3 "hilang kepercayaan kepada kami dan mencemar imej kami sebagai peguam. Ini kerana cek CIMB Islamic tersebut adalah wangnya sendiri di mana … adalah daripada akaun klien. Sebagai peguam kami bertanggungan untuk tindakan undang-undang jenayah dan sivil serta tindakan disiplin oleh Majlis Peguam kerana akaun tersebut adalah akaun klien serta kegagalan membayar wang anakguam kami. Akaun tersebut juga boleh disenaraihitamkan oleh pihak Bank Negara Malaysia kerana kami boleh dianggap mengeluarkan cek tak laku atau cek tendang".

[43] SP3 corroborated SP2's testimony when he testified that the CIMB cheque was dishonoured. It was issued to him as payment for the balance of the purchase price of the sale of his house for

which the firm of M/s Saufi, Putra & Associates was responsible for the transaction. In relation to said dishonour, SP3 stated (Q&A 10, 11, 15 and 16 WSSP3):

> J: Saya berasa terkejut dan marah kepada Tetuan Saufi, Putra & Associates.
>
> Saya memaklumkan beliau yang saya kecewa dengan apa yang berlaku kerana cek CIMB Islamic tersebut adalah bagi membayar wang saya dan tidak seharusnya dikembalikan. Saya kemudiannya mengarahkan beliau menggantikan dengan cek baru dengan segera. Saya juga memberikan amaran kepada Plaintif Pertama bahawa jika beliau tidak menggantikan dengan cek baru dengan segera, saya akan melaporkan perkara ini kepada pihak polis. Beliau memaklumkan saya bahawa beliau akan menyiasat perkara ini.
>
> Saya juga berasa kecewa dan hilang kepercayaan kepada mereka kerana mereka seolah-olah mahu menipu saya dengan memberikan cek tendang. Cek tersebut sepatutnya boleh dibayar kerana ia adalah baki jual beli rumah saya yang telah dibayar kepada mereka. Mereka adalah peguam muda yang saya berasa tidak jujur dan tidak bertanggungjawab.
>
> 16. S: Adakah Encik mempunyai apa-apa urusan guaman lagi dengan Tetuan Saufi, Putra & Associates?
>
> J: Tidak lagi kerana saya melantik peguam lain. Ketika kejadian ini berlaku saya juga memberitahu saudara-saudara dan rakan-rakan saya termasuk yang bekerja di syarikat kewangan dan bank dan mengingatkan mereka supaya tidak berurusan dengan Tetuan Saufi, Putra & Associates.

[44] In this present case I am mindful that:

(i) the plaintiffs is a legal firm wherein the preservation of good image, reputation, integrity and client's trust and confidence in them are the mainstay of their profession;

(ii) notwithstanding there were no actual complaints to the Bar Council, police report or civil or criminal action made against the plaintiffs, I am of the view the likelihood of the same was imminent and real;

(iii) there was no notification forthcoming from the defendant in respect of the CTCS problem despite knowing the plaintiffs' predicament save for the letter dated 24 July 2008 to M/s Saufi, Putra & Associates apologising for inconvenience caused for the CTCS problem which was post event; and

(iv) the defendant's conduct of refunding RM105 pertaining to the dishonour of the CIMB cheque.

[45] Having regard to the evidence, I am not inclined to award any aggravated damages as I do not find any kind of high-handed oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering, which is caused by defamation and which may constitute injury to the plaintiffs' pride and self-confidence and business reputation (see *Mehrotra's Commentary on Law of Defamation Damages & Malicious Prosecution (Civil & Criminal)* (5th edn.) 2004 referred to in *Dato' Dr Tan Chee Khuan* (*supra*) p. 628 G-H).

[46] The case of *Gibbons* (*supra*) cited by the defendant is not relevant as the plaintiffs are not claiming special damages.

Conclusion

[47] Having regard to the aforesaid principles and the circumstances alluded to, I awarded the total sum of RM275,000 as general damages to the plaintiffs after allowing a deduction of RM25,000 as mitigation on the part of the defendant which award in my opinion is fair and reasonable for the injury and embarrassment caused. After hearing the parties, costs to be paid by the defendant to the plaintiffs was fixed at RM40,000.